

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
The United Power Line Council)	WC Docket No. 06-10
)	
For a Declaratory Ruling Regarding the)	
Classification of Broadband Over Power Line)	
Internet Access Service as an)	
Information Service)	

**THE COMMENT OF
THE PENNSYLVANIA PUBLIC UTILITY COMMISSION**

The Pennsylvania Public Utility Commission (PaPUC) hereby submits this Comment in response to the Federal Communication Commission's (FCC) Public Notice at DA 06-49 issued on January 11, 2006. The January 11, 2006 Notice concerned the Petition of the United Power Line Council (UPLC) for a Declaratory Ruling. The UPLC Petition asks the FCC to declare Broadband over Power Line Internet Access Service to be an "information service" pursuant to 47 U.S.C. § 153(20) and 47 C.F.R. § 1.2 of the FCC's Rules.

Comment of the Pennsylvania Public Utility Commission

The PaPUC appreciates the opportunity to file a Comment. As an initial matter, the PaPUC's Comment should not be construed as binding on the PaPUC in any proceeding before the PaPUC. Moreover, the suggestions contained in this Comment may change in response to subsequent events.

This includes a later review of other filed Comments and legal or regulatory developments at the federal or state level.

The PaPUC Comment makes three brief suggestions. First, the PaPUC suggests that the FCC consider whether this proceeding is the best forum for deciding the legal classification of BPL. This issue is under examination as a generic matter for all Internet Protocol services in the IP-Enabled Services NOPR and the Intercarrier Compensation proceeding. Second, the PaPUC also suggests that the FCC consider addressing the technological and policy issues raised by Petitions for Reconsideration in the BPL proceeding already underway in ET Docket No. 04-37. Finally, the PaPUC suggests that the more generic proceedings may be the better place to decide complex issues identified in the UPLC Petition, such as market power and certain, in this limited proceeding.

The PaPUC understands the concerns in the UPLC Petition about the need for market certainty given some evidence of continuing market power. Nevertheless, the PaPUC urges the FCC to consider whether there is a need to issue a definitive order in this proceeding. The FCC is examining the legal classification, compensation, and public policy implications for all IP services in the Intercarrier Compensation and IP-Enabled Services proceedings. Those generic proceedings include BPL and internet access.

The legal classification of new technologies, such as BPL, is pending in the IP-Enabled Services NOPR at WC Docket No. 04-36. Moreover, the FCC is attempting to reconcile legal categories with realistic compensation structures in the Intercarrier Compensation proceeding at Docket CC 01-92.

In addition, the FCC is struggling with technological and policy issues surrounding E-911.

The extensive record on those complex issues in the generic proceedings leads the PaPUC to suggest that a hurried classification of BPL as an “information service” in this limited proceeding or the DSL proceeding may be inadvisable. Such a limited issue may be better addressed in the generic proceedings following an intensive consideration of allegations about market power and access to critical facilities.¹

The PaPUC reminds the FCC that important technological and policy issues are pending in the FCC Docket devoted to BPL issues. There are several Petitions for Reconsideration in the FCC’s current BPL docket at ET 04-37, for example, that are not yet posted for comment. The PaPUC suggests that the FCC consider acting on the outstanding matters before undertaking the issues contained in the UPLC Petition.

The American Radio Relay League (ARRL) Reconsideration Petition and several other petitions raise important technological and engineering facts. This includes new means of reducing, if not eradicating, radio interference from some equipment now used to provide “step-down” or wireless BPL. The PaPUC recognizes that these matters may appear to be the specialty of engineers, software designers, and equipment manufacturers. However, the PaPUC suggests that the FCC resolve these important kinds of technical issues before undertaking matters like BPL’s legal classification.

¹ The PaPUC notes that the UPLC Petition in this proceeding appears to dovetail with the FCC’s proposed legal classification of some forms of DSL service in the pending DSL Proceeding at Docket

Otherwise, a decision in this proceeding and the absence of action in the current BPL docket could embroil the FCC in litigation with the parties in both proceedings.

The PaPUC also suggests that the FCC consider a comprehensive approach for all IP-Enhanced Services in the generic proceedings. The combination of comprehensive solutions and creation of a workable compensation regime is far more important to market certainty and power than ancillary decisions in limited proceedings.

If, however, the FCC decides to issue an order on BPL's legal status before resolving the outstanding engineering and policy issues, the PaPUC urges the FCC to consider a decision that continues the general principles of federalism in which authority is shared between the FCC and the states. The PaPUC urges the FCC to consider adoption of NARUC's position on federalism, at the very least, which urges the FCC to retain state authority to address consumer issues at the state level. Moreover, the PaPUC also suggests that the FCC consider the PaPUC's previous suggestion that states be authorized to initially address radio interference matters.

Another equally important issue under consideration in the IP-Enabled Services and Inter-carrier Compensation proceedings is the market result of a classification decision. The PaPUC understands that if all IP services are classified as "information" services, any "information service" providers that also control a considerable portion of the facilities needed to provide information services might have no obligation to provide access to other

No. 02-33. The PaPUC's suggestions and considerations in this Comment are equally applicable to

information providers. That could occur because the obligation to provide services under publicly known prices and conditions in tariffs applies only to Title II telecommunications services. This obligation may not apply to information services.

As a result, entities that own a considerable portion of the nation's voice, data, and video transmission infrastructure may only have to make their facilities available to other information services providers by private contracts. These private contracts may not be subject to state or federal common carrier and tariff obligations or review.

That is not the case for Title II services. The combination of competition and control may be difficult for non-facilities "information service" providers to overcome. That could occur if non-facilities "information service" providers have to negotiate private contracts for access with entities that already control or own the facilities needed to reach the end-user customer for whom they both compete. There may be adverse market impacts if this approach is taken instead of providing that access under publicly known common carrier tariff obligations and prices.²

the pending DSL Proceeding as well.

² Recent press articles suggest that some entities owning or controlling telecommunications facilities may also benefit by an approach that distinguishes between a Title II "common carrier" classification for wholesale pricing of the facilities needed to deliver the voice, data, and video "information services" to end-user customers. For example, AT&T recently alleged that some "content providers" are obtaining free access to legacy and modernized networks. www.theinquirer.net/htm. Moreover, Verizon's continuing commitment to their FIOS deployment requires a significant amount of private financing that is raising concerns to investors. <http://washingtonpost.com>. A creative resolution of the "telecommunications" versus "information services" classification issue might result in wholesale tariffs priced high enough to attract the private financing needed to provide voice, data, and video services to end-user customers. However, the PaPUC suggests that this limited proceeding may not be the best forum for a detailed examination and consideration of this complex issue.

In addition, the PaPUC understands that there is an alternative legal interpretation of Section 251(a) of TA-96. This interpretation holds that the obligation to seamlessly interconnect to the “telecommunications” network applies to “telecommunications” but is not applicable to “information services” or their providers. An end-user customer using IP-Enabled Services, like BPL, to conduct business or personal affairs that require interaction with the traditional PSTN or its modernized equivalent may not be able to conduct that business. This may occur because incumbent carriers could well be under no Section 251(a) legal obligation to interconnect “information service” providers to networks that are not classified as “telecommunications” under TA-96. Services equivalent to interconnection might occur but only at privately negotiated contractual rates. They might not be subject to the public disclosure and regulatory obligations imposed on “telecommunications” providers as Title II common carriers.

Finally, the PaPUC is also aware of an alternative legal view suggesting that the FCC’s ancillary jurisdiction is not separate and distinct but must be exercised only in relation to other regulatory authority. Consequently, the FCC may be unable to rely on the *Cable Modem* decision in the manner suggested by footnote 3 in the UPLC Petition. This could mean that the FCC may be unable to rely on ancillary jurisdiction to impose any quasi-common carrier obligations on information services providers.

The PaPUC suggests that these allegations and interpretations could impact BPL service. In that regard, the PaPUC notes that the UPLC Petition specifically mentions market power and certainty. As indicated earlier, those issues are pending in the generic Intercarrier Compensation

and IP-Enabled Services proceedings. The PaPUC suggests that this limited proceeding and the limited DSL Proceeding may not be the best proceedings to examine these matters.

The UPLC Petition seems to reiterate similar claims made in those generic proceedings. The UPLC Petition states that “92% of all advanced service lines are DSL and cable modem, and the vast majority of the country is only served by fewer than three providers of high-speed services (i.e., not even broadband). Moreover, the cable modem service providers have over three times as many advanced service lines as DSL. Finally, 95% of all DSL lines are provided by ILECs and 83% percent of that 95% is provided by a Regional Bell Operating Company (RBOC).”

A rushed decision to classify BPL service as an information service may result in end-user consumers having only three vertically-integrated information service providers, *e.g.*, Cable, DSL, and BPL. At the present time, however, consumers have access to these and other information service providers. This seems to occur because providers without facilities obtain access to end-user customers through special access arrangements based on a facility owner’s Common Carrier status under Title II. That may not apply if those same facilities are integrated into an “information service” classification applicable to the voice, data, or video application using those facilities.

The PaPUC urges the FCC to weigh these allegations and interpretations when deciding whether to address the legal classification of BPL in this limited proceeding as opposed to the generic proceedings. The

PaPUC respectfully suggests that the generic proceedings may be a better forum to address that issue given the complexity of these allegations. The record in those proceedings is more robust. The record also contains more detailed pleadings by the parties on complex legal, technological, and public policy issues surrounding all IP services.

Respectfully submitted,

Pennsylvania Public Utility Commission

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